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Dear Maxine and Cara,

Proposed connection contract between Network Rail Infrastructure Limited (Network Rail) and Rail for London Infrastructure Limited (RfL(I)) at Westbourne Park

1. On 4 March 2019 the Office of Rail and Road (**ORR**) approved the terms of the connection contract submitted on 10 December 2018 by Network Rail and RfL(I) (**the parties**) under section 18 of the Railways Act 1993 (**the Act**). This agreement relates to the connection at Westbourne Park. Please find enclosed a copy of our direction notice, directing the parties to enter into the contract. This letter sets out the reasons for our decision.

Background

2. As part of the Crossrail project, RfL(I) has built a new network, called the Crossrail Central Operating Section (**CCOS**), which connects with Network Rail's network at three points:
 - Abbey Wood with North Kent Lines;
 - Pudding Mill Lane with Great Eastern (electric lines); and
 - Westbourne Park with Great Western Main Line (relief lines).
3. Each of these connections will have its own connection contract. This agreement covers the connection at Westbourne Park¹.
4. The contracts for Pudding Mill Lane and Westbourne Park will be different from the model connection contract², as there is no connecting network as usually exists when a facility owner connects to Network Rail's network. Instead, two Infrastructure Managers are connecting their networks together at a designed point, which is part of the running line. This is discussed further in the "Connecting network" section [below](#).
5. Due to the non-standard nature of the connections, we met with the parties in March 2017 and January 2018 to discuss their proposals.

¹ Our decisions for Abbey Wood and Pudding Mill Lane are available at <http://orr.gov.uk/rail/access-to-the-network/track-access/track-access-decisions>.

² <http://orr.gov.uk/rail/access-to-the-network/track-access/forms-model-contracts-and-general-approvals>.

Consultation

6. Network Rail ran an industry consultation for the new connection contract from 1 November 2018 to 30 November 2018. No outstanding objections from the consultation were declared.

ORR Review

7. We received the formal submission of the application on 10 December 2018.

Connecting network

8. A significant change from the model connection contract is the removal of the concept of “connecting network” from the contract, and by extension, any maintenance costs in the contract. The parties argue that the nature of the connection, with both parties responsible for the maintenance, repair and renewal of its assets up to the connection point, including the costs of these activities, is different from, for example, a freight facility connecting to Network Rail’s network. There will be regular passenger services crossing the connection, and the parties, as Infrastructure Managers, are required and funded to maintain their networks to mainline standards.
9. The parties told us there will be a clear demarcation of who is responsible for which assets on the ground, in the Operational and Maintenance Protocols, as well as in the connection contract in Schedule 1 and with physical boundary markers on-site. We asked the parties in our review of this application to provide us with detailed evidence that these boundaries and responsibilities were clearly understood. The parties provided us with further evidence and we are content that the parties are clear on the boundaries and the ownership of the assets on the ground.
10. We also asked for further information regarding gantry 5 that was included in the assets in Schedule 1 but not marked on the connection plan in Schedule 4. The parties provided us with an additional connection plan that shows gantry 5, to avoid any future confusion. They also provided at the same time an updated version of the original connection plan, with corrected grid references. We are content with the provided plans. We are including the updated connection plan and additional connection plan as amendments in our directions, as agreed with the parties.
11. We reviewed the modifications to clause 15, which removes the charging provisions and adds a provision for the parties to review the operation of the connection contract at five-yearly interval, and the removal of clauses 12.2 and 16. The review provision explicitly includes charging as a principle that can be reviewed in clause 15.1 (b) (ii). We are content that there is a safeguard in the contract for the parties to review charges, although the parties retain their right to apply to us for a new contract under section 17 of the Act if they cannot agree in future. Therefore, we approve these changes to clauses 12.2, 15 and 16, and the subsequent consequential changes to the contract.

Termination clauses

12. The parties also applied for customisation of the termination clauses. In the model contract, either party to the contract can terminate the contract with a set period of notice, agreed between the parties in the contract. The parties want to modify this to allow the connection contract to remain in place unless both parties agree that the

contract should be terminated. Therefore, they removed references to expiry and termination of the contract.

13. We examined this closely, as this is unusual and potentially removes an important protection from the contract for both parties. The parties have included a review provision in the contract, which allows the parties to review the operation of each connection contract at five-yearly intervals. The parties also noted that the contract could be terminated by mutual agreement if necessary in future.
14. Both parties are public sector Infrastructure Managers and want to enter this bespoke arrangement to provide certainty warranted by the significant levels of investment associated with this project. They do so with their eyes wide open, fully understanding the implications. This is part of a very significant and long-term project and the parties say that a unilateral termination clause is not needed. In this case, we have therefore been persuaded to approve this modification. They also have a right, under the Act, to apply to us for new connection contracts under sections 17 or 18, as appropriate.
15. Our approval of this modification, with its very specific circumstances, does not mean other parties should expect us to approve the removal termination clauses from their contracts.

Condition precedent

16. The parties included a condition precedent in clause 2 and a related definition of Effective Date in clause 1. This reflects that certain conditions will need to be met by both parties before clauses 4 to 7 of the contract come into effect. This includes clauses 2.3.1 (b) and 2.3.2 (b) covering RfL(I) being granted an estate or interest in, or right over the CCOS. This was added after the consultation in the submission of 10 December 2018. As this covers a purely contractual matter between the parties, it will not disadvantage any other party and we are content to approve it.

Other modifications

17. There are other modifications from the model connection contract to reflect the nature of the connection and that RfL(I) is an Infrastructure Manager. These include:
 - Adjacent Facility Owner changed to CCOS Infrastructure Manager throughout;
 - Inclusion of Transport for London (**TfL**) as a company in clause 1.1;
 - New and amended definitions for Access Disputes Resolution and Network Codes, to reflect that CCOS has its own Access Disputes Resolution Rules and Network Code, both of which are relevant to the contract;
 - Inclusion of a condition precedent in clause 2 to RfL(I) becoming the facility owner of the CCOS;
 - Inclusion of a Connection Point assets definition;
 - Amendments to Emergency and Force Majeure Event definitions;
 - Modifications to clauses 5 and 6 to reflect that RfL(I) is an Infrastructure Manager and the existence of the Operational and Maintenance Protocols; and
 - Amendments to the confidentiality/Freedom of Information provisions in clause 13 to reflect that TfL/RfL(I) is also subject to the Freedom of Information Act and Environmental Information Regulations.

18. We are content to approve these modifications.

ORR Decision

19. This application is under section 18 of the Act and therefore is agreed between the parties, who are prepared to enter into the agreement, subject to the amendments detailed above in our directions

20. In making this decision, we are satisfied that this decision reflects our duties under section 4 of the Act, in particular:

- (i) facilitating the construction of Crossrail;
- (ii) to protect the interests of users of railway assets;
- (iii) to promote the use of railway network in Great Britain for the carriage of passengers and goods and the development of that railway network, to the greatest extent ...economically practicable;
- (iv) to promote efficiency and economy on the part of the persons providing railway services; and
- (v) to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance.

21. Under clause 18.2.3 of the connection contract, Network Rail is required to produce a conformed copy, within 28 days of any amendment being made, and send copies to ORR and RfL(I). We look forward to receiving the conformed copy.

22. In entering any provision on the register, we are required to have regard to the need to exclude, as far as is practicable, the matters specified in section 71(2)(a) and (b) of the Act. These sections refer to:

- (i) any matter which relates to the affairs of an individual, where publication of that matter would or might, in the opinion of the ORR, seriously and prejudicially affect the interests of that individual; and
- (ii) any matter which relates to the affairs of a particular body of persons, whether corporate or incorporate, where publication of that matter would or might, in the opinion of the ORR, seriously and prejudicially affect the interests of that body.

23. Therefore, when submitting the copy of the signed agreement would you please identify any matters that you would like us to consider redacting before publication. You will need to give reasons for each request explaining why you consider that publication would seriously and prejudicially affect your interests.

Yours sincerely

Katherine Goulding